

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
LEWIS B. AND MARIAN A. REYNOLDS }

For Appellants: Mr. Lewis B. Reynolds, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Gary Paul Kane
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Lewis B. and Marian A. Reynolds against a proposed assessment of additional personal income tax in the amount of \$94.01 for the year 1962.

The question presented is whether dry rot damage to a sun deck caused by fungus constituted a deductible casualty loss.

In 1957 appellants had a large sun deck built as an addition to their house in Berkeley, California, at a total cost of \$3,729.10. The sun deck was designed by a licensed architect and engineered by a licensed structural engineer. Since the deck was not roofed, adequate drainage was principally supplied by open spacing between the floor planks. Unusually heavy rainfall occurred in the Berkeley area during the first four months of 1958 and in February and early March of 1962.

No outward evidence of destructive wood rot was noted when the deck was thoroughly cleaned and the windows washed in December of 1961, Early in the spring of 1962,

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however, evidence of dry rot damage was discovered. Thereafter, on April 9, 1962, Able Termite Control, a licensed organization specializing in the detection and repair of such damage, made a thorough inspection. This survey disclosed major wood rot damage, including injury not visible on the surface. The damage was mostly concentrated in a contiguous area along one side and one corner of the deck. Able Termite Control repaired the damage at a cost to appellants of \$1,343. This amount approximated appellants' actual loss as a result of the dry rot damage.

Appellants deducted the loss on their return for 1962 pursuant to section 17206 of the Revenue and Taxation Code which allowed a deduction in the case of an individual for "Losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty," and were not "compensated for by insurance or otherwise." Respondent Franchise Tax Board disallowed the deduction, asserting that the dry rot damage did not occur with sufficient suddenness to be a deductible casualty loss,

Generally, damage by dry rot or termites does not occur with sufficient suddenness to constitute an "other casualty" within the meaning of the similar casualty loss provision in the federal income tax law. (United States v. Rogers, 120 F.2d 244, modified on rehearing, 122 F.2d 485; Fay v. Helvering, 120 F.2d 253.) In Fay v. Helvering, supra, the court pointed out that the word "casualty" denotes an accident, amishap, some sudden invasion by a hostile agency; it excludes the progressive deterioration of property through a steadily operating cause. In the Rogers case, upon rehearing, supra, p. 485, the court did not define the word "casualty" but concerned itself with the words "or other casualty" and relied on the fact that the similar characteristic of loss by fire, storm or shipwreck is in the suddenness of the loss so that the statute should be interpreted as though it read "fires, storms, shipwrecks or other sudden casualty." Damage from dry rot or termites was not regarded as damage from such "other sudden casualty." Only where the taxpayer can clearly establish suddenness will dry rot or termite damage be allowed as a deductible casualty loss. (Rosenberg v. Commissioner, 198 F.2d 46; Shopmaker v. United States, 119 F. Supp. 705; Buist v. United States, 164 F. Supp. 218; E. G. Kilroe, 32 T.C. 1304; Henry F. Cate, Jr., T.C. Memo., Dkt. No. 85922, Sept. 11, 1962,)

The burden of proof to establish that the loss occurred with sufficient suddenness so as to constitute a casualty loss rests upon the taxpayer. (Hoppe v. Commissioner,

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354 F.2d 988; Leslie C. Dodge, 25 T.C. 1022; Winsor v. Commissioner, 278 F.2d 634; Joseph A. Austra, T.C. Memo., Dkt. No. 2003-64, Feb. 9, 1966.) Damage to the woodwork may be present notwithstanding the absence of outward signs of such infestation. (Leslie C. Dodge, supra; Joseph A. Austra, supra; Winsor v. Commissioner, supra.) As in the strikingly similar factual situation presented in Hoppe v. Commissioner, supra, 354 F.2d 988, appellants have not established that the fungus infestation began as a result of the 1962 rains. The 1962 rains might well have furnished merely additional moisture for a continuous process of decay that already had been in progress for some time; Accordingly, we have no basis for concluding that the dry rot damage occurred with sufficient suddenness so as to constitute a deductible casualty loss.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED pursuant to section 18595 of the Revenue and Taxation Code that the action of the Franchise Tax Board on the protest of Lewis B. and Marian A. Reynolds against a proposed assessment of additional personal income tax in the amount of \$94.01 for the year 1962, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of October, 1967, by the State Board of Equalization.

Paul R. Leake, Chairman
John W. Lynch, Member
Charles H. H. H., Member
John R. H. H., Member
John R. H. H., Member

ATTEST: John R. H. H., Secretary